S T A T E O F M I C H I G A N

IN THE SUPREME COURT

APPEAL FROM THE PROBATE COURT FOR THE COUNTY OF SAGINAW
THE HONORABLE PATRICK J. McGRAW, PROBATE JUDGE, PRESIDING

FLOYD RAU, Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased; JOYCE ANN FLORIP; KAREN JEAN PETERSON; and SANDRA LEE PARACHOS,

Plaintiffs- Appellants,

vs.

ELIZABETH M. LEIDLEIN,

Defendant-Appellee.

-and-
vs.

MARIANNE DURUSSEL,
Defendant-Appellee.

Supreme Court
File No. 126758

Court of Appeals
File No. 247516

Saginaw County
Probate Court
File No. 01-111943-DE-CZ

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APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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ISSUE I.

HAS MCL 700.2514 DISPLACED THE CASE LAW THAT PREDATED THE ADOPTION OF THE ESTATES AND PROTECTED AND INDIVIDUALS CODE, MCL 700.101, ET SEQ (EPIC), UNDER MCL 700.1203(1)?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellants assert the answer is, "In part, Yes and in part No."

ISSUE II.

IS THERE ANY SECONDARY AUTHORITY IN WILLS AND ESTATES LAW (E.G. HORNBOOKS AND TREATISES), OR PRACTICE IN THE FIELD, THAT SUPPORTS THE PROPOSITION THAT A MUTUAL WILL IMPOSES RESTRICTIONS ON THE SURVIVING SPOUSE'S POWER OF DISPOSAL IN THE ABSENCE OF EXPRESS CONTRACTUAL LANGUAGE OR TESTAMENTARY LIMITATIONS ON THE POWER OF ALIENATION?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellants assert the answer is, "Yes."

ISSUE III.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE REAL PROPERTY IN QUESTION WAS NOT COVERED BY THE COUPLE'S WILL CONTRACT AND INSTEAD AUTOMATICALLY PASS TO THE HUSBAND OUTSIDE OF HIS WIFE'S WILL BY VIRTUE OF HIS SURVIVORSHIP RIGHTS OF THEIR JOINT TENANCY?

Appellants assert the answer is, "Yes."

Appellees assert the answer is, "No."

The Court of Appeals assert the answer is, "No."

ISSUE IV.

DOES THE MERE FACT THAT HERBERT AND ILA VANCONETT ENTERED INTO A MUTUAL WILL IMPOSE RESTRICTIONS ON THE SURVIVING SPOUSE'S POWER OF DISPOSAL DESPITE THE ABSENCE OF EXPRESS CONTRACTUAL OR TESTAMENTARY LIMITATIONS ON THE POWER OF ALIENATION?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellants assert the answer is, "Yes."

ISSUE V.

WHAT IS THE SOURCE AND NATURE OF SUCH A RESTRAINT IF IT IS CONTENDED THAT HERBERT VANCONETT WAS SO RESTRAINED FROM DISPOSING OF HIS ESTATE?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

STATEMENT OF FACTS

This case involves the right of the decedent, HERBERT L. VanCONETT, to dispose of property following the death of his wife, ILA R. VanCONETT, under a mutual Will made pursuant to a contract to make a Will.

On 3-6-1989, HERBERT L. VanCONETT and ILA R. VanCONETT, husband and wife, executed separate but mutual Wills. See ***Appendix 6a*** for HERBERT L. VanCONETT's Will and ***Appendix 8a*** for ILA R. VanCONETT's Will. Both of these Wills were placed on file with the Saginaw County Probate Court for safekeeping. (***Appendix 64a***)

Paragraphs 2 and 3 of each spouse's Will left all of his/her property first to the surviving spouse and, if that spouse were deceased, then to designated beneficiaries. Specifically, HERBERT L. VanCONETT's Will provided:

> "SECOND: I give, devise and bequeath all the rest and residue of my estate, of whatever nature or description, whether real, personal or mixed, wherever the same may be situated, unto my beloved wife, ILA R. VanCONETT.
>
> THIRD: In the event my wife, ILA R. VanCONETT, shall predecease me, then I give, devise and bequeath all the rest and residue of my estate, of whatever nature or description, whether real, personal or mixed, wherever the same may be sitauted, unto my sister-in-law, JOYCE ANN FLORIP, of 515 West Ontario, Rogers City, Michigan 49779; my niece, KAREN JEAN PETERSON, of 405 Holland, Flushing, Michigan 48433; and my niece, SANDRA LEE PARACHOS, of 1179 Maplekrest Drive, Flint, Michigan 48504, equally share and share alike." (***Appendix 6a***)

Each Will contained a reciprocal contract provision. Specifically, the Will of HERBERT L. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement

entered into between my wife, ILA R. VanCONETT, and myself for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable." (***Appendix 7a***)

The attestation clause of HERBERT L. VanCONETT's Will specifically indicates:

"We hereby attest that the foregoing instrument was on the date hereto, in our presence, signed, sealed and declared by HERBERT L. VanCONETT, the above named Testator, to be his Last Will and Testament, **made pursuant to a contract or agreement between himself and his wife**, ILA R. VanCONETT, **as therein provided**, . . ." (Emphasis Added) (***Appendix 7a***)

At the time of executing their Wills, the VanCONETT's were the owners of a home and real property they had acquired in June, 1956, taking title as, *"Herbert L. VanConett, Ila R. VanConett, and Florence H. VanConett, as joint tenants with full right of survivorship and not as tenants in common"*. (***Appendix 35a***) The joint tenant, Florence H. VanConett, died April 16, 1967. (***Appendix 87a***)

Ila R. VanConett died July 18, 1993. (***Appendix 10a***) As of that date, neither HERBERT L. VanCONETT nor ILA R. VanCONETT had withdrawn their Will from safekeeping with the Saginaw County Probate Court. [***Appendix 64a***, Paragraph 2(d)]

On May 31, 1996, HERBERT L. VanCONETT executed a Quit-Claim Deed conveying the fee title of the parties' marital home and real property to his neighbor, Defendant, MARIANNE DURUSSEL, for $1.00 and reserved unto himself a life estate. (***Appendix 36a***) The Quit-Claim Deed was prepared by F. H. MARTIN and typed and

witnessed by his secretary, LUCY T. BELILL. (***Appendix 36a***)

On November 19, 1996, HERBERT L. VanCONETT withdrew his Will from safekeeping with the Saginaw County Probate Court. [***Appendix 64a***, Paragraph 2(e)]

HERBERT L. VanCONETT died 10-26-01. (***Appendix 11a***) On 12-11-01, an authenticated photocopy of decedent's Last Will and Testament, dated 3-6-89, was admitted to probate in the Probate Court of Saginaw County, Michigan, being File No. 01-111943-DE. [***Appendix 23a, 64a***, Paragraph 2(g)] In so doing, the Probate Judge stated:

> "The Court has been presented with a petition to admit a copy of a Will. The Court has heard testimony here today from the witnesses of these Wills. The Court has also reviewed the statutes including MCLA 700.2505 as to revocation of writing which indicates that a Will can be revoked, however, it also has to be reconciled with section 2205 and 2514 regarding contracts.
>
> **A contract was entered into between the husband and wife in regard to this Will which made it irrevocable.** The Court is going to admit the copy of the Will to probate as decedent's Last Will and Testament finding that the decedent did die on October 26 of 2001 . . ." (***Appendix 21a, 22a***) (Emphasis Added)

Plaintiff, FLOYD RAU, was appointed Personal Representative of decedent's Estate by Order, dated 12-11-01, and Letters of Authority were issued him 12-11-01. (***Appendix 23a, 64a***, Paragraph 2(h))

On 5-3-02, Plaintiffs filed a civil action against Defendant, MARIANNE DURUSSEL, seeking an Order to cancel and set aside the 5-31-96 Quit-Claim Deed and also specific performance of an alleged contract between decedent, HERBERT L. VanCONETT, and his wife, ILA R. VanCONETT, pursuant to which their separate but mutual

Wills were executed. See Complaint. (***Appendix 26a***)

On 5-3-02, Plaintiffs filed a separate civil action against Defendant, ELIZABETH M. LEIDLEIN, seeking to recover monies and other personal property decedent had given to, gifted and/or made joint with Defendant, ELIZABETH M. LEIDLEIN. Plaintiffs also alleged that Defendant LEIDLEIN had converted other assets which rightfully belonged to Plaintiff Estate and/or Plaintiff contract beneficiaries. Plaintiffs further sought an accounting of all the personal property and monies of decedent that Defendant LEIDLEIN controlled in her capacity as Power of Attorney for decedent and in handling decedent financial affairs. See Complaint. (***Appendix 38a***)

Plaintiff, FLOYD RAU, commenced both suits in his capacity as Personal Representative of the Decedent's Estate seeking to recover the real and personal assets in question as asset of Decedent's Estate. (***Appendix 26a, 38a***) Plaintiffs, JOYCE ANN FLORIP, KAREN JEAN PETERSON, and SANDRA LEE PARACHOS, brought said actions as the beneficiaries under the above mentioned alleged contract between decedent and his wife. (***Appendix 26a, 38a***)

On 12-17-02, Plaintiffs filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(9) and (10) as to Defendant, MARIANNE DURUSSEL. (***Appendix 61a***)

On 1-15-03, Defendant, MARIANNE DURUSSEL, filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (10) against the Plaintiffs.(***Appendix 93a***)

The Court by *Opinion and Order*, dated 2-25-03, denied

Plaintiffs' Motion for Summary Disposition and granted summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of Defendant, MARIANNE DURUSSEL. (***Appendix 144a***)

As to the claim of FLOYD RAU as Personal Representative of the Estate of HERBERT L. VanCONETT, Deceased, the Court in the above mentioned *Opinion and Order* found, among other things:

(a) That HERBERT L. VanCONETT's Will was revocable. The Court based this finding on the fact that the lawyer who drafted the Wills and the secretary who typed the Wills, although both indicating that the Wills were irrevocable subsequently showed that intent was not present when they prepared, signed and notarized the subsequent deed involving the property after the death of ILA R. VanCONETT. (***Appendix 147a***)

(b) That decedent, HERBERT L. VanCONETT, had destroyed his Will by removing it from the Saginaw County Probate Court on 11-19-96 - being after the death of his wife. (***Appendix 148a***)

(c) That the real property in question was held by HERBERT L. VanCONETT and ILA R. VanCONETT as "tenants by the entirety". (***Appendix 147a, 148a***)

(d) That the Estate lacked standing to bring the suit as the real property passed outside of probate by virtue of the tenancy created. (***Appendix 148a***)

As to the suit filed by Plaintiffs, JOYCE ANN FLORIP, KAREN JEAN PETERSON and SANDRA LEE PARACHOS, as contract beneficiaries, the Court found:

(a) That said Plaintiffs failed to establish a contract as alleged. (***Appendix 148a***)

(b) The lack of extrinsic evidence that would support such a contract. (***Appendix 148a***)

The Court further found that none of the Plaintiffs had established that the statutory requirements of MCL 700.2514 were met as it pertains to a contract to make a Will. (***Appendix 148a***)

Plaintiffs filed a Motion for Reconsideration (***Appendix 149a***) which was denied by Order Denying Motion for Reconsideration, dated March 6, 2003. (***Appendix 162a***)

Plaintiffs and Defendant, ELIZABETH M. LEIDLEIN, stipulated that the facts in Plaintiffs' Complaint against Defendant DuRUSSEL were also facts applicable to Plaintiffs' Complaint against Defendant LEIDLEIN. (***Appendix 164a***) Based upon that stipulation, the Probate Court, using its authority under MCR 2.116(I), by an *Opinion and Order*, dated March 24, 2003, granted summary disposition in favor of Defendant LEIDLEIN pursuant to MCR 2.116(C)(8) and (10). (***Appendix 165a***) In so ruling, the Court stated in its Opinion:

> "This conclusion is based upon the findings of fact and conclusions of law set forth in this Court's Opinion and Order, dated February 25, 2003, and Order Denying Motion for Reconsideration, dated March 6, 2003, rendered in Plaintiffs' action against Defendant, MARIANNE DURUSSEL, and the same is incorporated herein by reference." (***Appendix 166a***)

Appellants filed a Claim of Appeal as of right to the Michigan Court of Appeals on March 26, 2003.

The Court of Appeals initially issued an Opinion for publication, dated May 11, 2004. (***Appendix 167a***)

Appellants filed a Motion for Reconsideration of that May 11, 2004 Opinion (***Appendix 171a***); said Motion was denied by an Order, dated June 28, 2004. (***Appendix 180a***)

On the Court of Appeals' own Motion, the May 11, 2004 Opinion was vacated (***Appendix 181a***) and a new amended Opinion for publication was rendered July 1, 2004. (***Appendix 182a***)

In that Opinion (***Appendix 182a***), the Court of Appeals affirmed in part, reversed in part and remanded to the Saginaw County Probate Court, stating:

> "After reviewing the record, we decide that the probate court erred in concluding that the VanConetts did not create a contract to make a will, and further decide that the beneficiaries of that contract had standing to bring an action to enforce it. The probate court did not err when it concluded that Herbert's will was revocable, however, the record is insufficient for us to determine whether Herbert revoke his will and whether that revocation breached the VanConetts' contract to make a will. Finally, we decide that the probate court did not err when it concluded that the estate did not have standing to bring a cause of action concerning the real property because the real property passed outside the VanConetts' wills. We affirm in part, reverse in part, and remand." (***Appendix 182a***)

Appellants filed an Application for Leave to Appeal 8-9-2004. Application was granted 1-13-2006 with specific instructions to include four issues among those to be briefed. (***Appendix 187a***)

ISSUE I.

HAS MCL 700.2514 DISPLACED THE CASE LAW THAT PREDATED THE ADOPTION OF THE ESTATES AND PROTECTED AND INDIVIDUALS CODE, MCL 700.101, ET SEQ (EPIC), UNDER MCL 700.1203(1)?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellants assert the answer is, "In part, Yes and in part No."

The relevant statutes read as follows:

"700.2514. Contracts to make or not to revoke a will or devise, or die intestate, establishment; joint or mutual wills

Sec. 2514. (1) If executed after July 1, 1979, a contract to make a will or devise, not to revoke a will or devise, or to die intestate may be established only by 1 or more of the following:

(a) Provisions of a will stating material provisions of the contract.

(b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.

(c) A writing signed by the decedent evidencing the contract.

(2) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills."

"700.1203. Principles of law and equity; implied repeals

Sec. 1203. (1) Unless displaced by the particular provisions of this act, general principles of law and equity supplement this act's provisions."

Public Acts of 1998, §386, effective 4-1-2000, enacted the Estates and Protected Individuals Code (EPIC), comprising MCL 700.1101 to 700.8102. That Act repealed the Revised Probate Code (1978 Public Acts 642) comprising of MCL 700.1 to 700.993. MCL 700.2514 is substantially the same as the provision in the Revised Probate Code which it replaced, i.e. MCL 700.140 which read as follows:

"**700.140. Contract concerning will, presumption**
Sec. 140. (1) A contract to make a will or devise, not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established only by 1 of the following:

(a) A provision of a will stating material provisions of the contract.

(b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.

(c) A writing signed by the decedent evidencing the contract.

(2) The execution of a joint will or mutual wills does not give rise to a presumption of a contract not to revoke the will or wills."

MCL 700.1203 is new as there was no comparable provision in the Revised Probate Code.

MCL 700.2514 establishes the only way after 7-1-1979 that parties can created "a contract to make a will or devise, not to revoke a will or devise or to die intestate." As such, it displaces all case law that authorized the creation of such contracts in a manner other than specified in the current law. The current law eliminates **oral** contracts to make a will or devise and **oral** contracts not to revoke a will or devise. Therefore, all Michigan case law that allowed for the creation of such oral contracts is displaced.

The Court of Appeals found, "...the probate court did not err in finding the decedent's will was revocable." (***Appendix 184a***) This was based on the Court of Appeals' ruling that:

> "When parties enter a contract to make a will, the contract, rather than the will itself, becomes irrevocable by the survivor after the death of a party. *Schondelmeyer, supra* at 570, quoting *Keasey v. Engles*, 259 Mich 178, syllabus; 242 NW 878 (1932). Thus, decedent had the right to revoke his will but he could not revoke the parties' contract. So, to the extent any subsequent wills contradicted the contract, plaintiffs have a right to seek specific performance of the agreement." (***Appendix 184a***)

Appellants would assert that MCL 700.2514 has displaced

case law that says the contract but not the will itself becomes irrevocable by the survivor after the death of a party to a mutual will. MCL 700.2514 specifically states:

> "a contract . . . not to revoke a will. . . may be established only by 1 or more of the following:
>
> * * * * *
>
> (c) A writing signed by the decedent evidencing the contract."

In this case, the Will of HERBERT L. VanCONETT contained the following provision:

> "**I hereby expressly acknowledge that this Will is made pursuant to a contract** or agreement entered into **between my wife, ILA R. VanCONETT, and myself** for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove in this, my Last Will and Testament, provided, and **I expressly declare that in the event my wife, ILA R. VanCONETT, shall predecease me, then and in that event, this my Last Will and Testament shall be irrevocable**." (Emphasis Added) (***Appendix 7a***)

ILA R. VanCONETT predeceased her husband and upon her death, HERBERT L. VanCONETT's Will became irrevocable. Given the express language in their mutual Wills, the Court of Appeals' decision in this record cannot be reconciled with MCL 700.2514(1)(c) In this case, both the Will of HERBERT VanCONETT and the contract with his wife upon which that Will was created became irrevocable upon his wife's death.

Similarly, MCL 700.2514(2) displaced all case law which held that the execution of a joint or mutual Will created a presumption of a contract not to revoke the Will(s). That statute makes it very clear that if it is the intent of two parties not to allow the survivor to revoke their joint or mutual Wills, they must expressly indicate that intention in their Will or some other

writing signed by the decedent.

Pursuant to MCL 700.1203, general principles of law and equity supplement MCL 700.2514. A reading of MCL 700.2514 does not reflect an intention to limit their application to the provisions therein. As such, once a contract "to make a Will" or "not to revoke a Will" has been established by one or more of the three ways indicated therein, the application of general principles of law and equity can be used to give effect to that contract. This would be consistent with the underlying purpose of EPIC as explained in MCL 700.1201:

> "**700.1201. Construction and application**
>
> Sec. 1201. This act shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:
>
> (a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.
>
> (b) **To discover and make effective a decedent's intent in distribution of the decedent's property**.
>
> (c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors.
>
> (d) To facilitate use and enforcement of certain trusts.
>
> (e) **To make the law uniform among the various jurisdictions, both within and outside of this state**." (Emphasis Added)

For reasons mentioned above, Appellant asserts that MCL 700.2514 has displaced in part, but not all, the case law that predated the adoption of MCL 700.1101, et seq. (EPIC), under MCL 700.1203(1).

ISSUE II.

IS THERE ANY SECONDARY AUTHORITY IN WILLS AND ESTATES LAW (E.G. HORNBOOKS AND TREATISES), OR PRACTICE IN THE FIELD, THAT SUPPORTS THE PROPOSITION THAT A MUTUAL WILL IMPOSES RESTRICTIONS ON THE SURVIVING SPOUSE'S POWER OF DISPOSAL IN THE ABSENCE OF EXPRESS CONTRACTUAL LANGUAGE OR TESTAMENTARY LIMITATIONS ON THE POWER OF ALIENATION?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellants assert the answer is, "Yes."

Support for the proposition that a mutual Will imposes restrictions on a surviving spouse's power of disposal in the absence of express contractual language or testamentary limitations on the power of alienation is found in:

97 Corpus Juris Secundum (97 CJS Wills),

79 American Jurisprudence 2nd Ed. (79 Am Jur 2d Wills), and

Annotation in ALR 3d 8 entitled "Right of Party To Joint or Mutual Will, Made Pursuant To Agreement As To Disposition of Property At Death, To Dispose of Such Property During Life"

In 97 CJS Wills, it is stated:

97 CJS Wills "§2034 Generally

* * * * *

". . .A mutual will is an agreement between two persons to devise property according to a common plan, by means of separate instruments that are reciprocal, identical, or substantially similar, and which frequently contain a promise on the part of each party not to revoke. [FN5] . . . The term 'mutual', so far as it relates to wills, appears to be applied and confined by the courts to wills which are executed in pursuance of a compact or agreement between two or more persons to dispose of their property, either to each other or to third persons, in a particular mode or manner. . ."

97 CJS Wills "§2056. After death of one party

* * * * *

"The general rule is that, on the death of one of the parties to an agreement for joint, mutual, or reciprocal wills, leaving a will in accordance with the agreement, the survivor is estopped, or precluded, from making any other or different disposition of his or her property than that contemplated in the agreement, and his or her obligations under the agreement become absolutely irrevocable and enforceable against him or her.

* * * * *

Where an agreement as to mutual wills does not define the survivor's power over the property, but merely provides as to the disposition of the property at his or her death, the survivor may use not only the income, but reasonable portions of the principal, for his or her support and for ordinary expenditures, [FN4] and he or she may change the form of the property by reinvestment, [FN5] but must not give away any considerable portions of it [FN6] or do anything else with it that is inconsistent with the spirit or the obvious intent and purpose of the agreement. [FN7]

In the absence of an express contract prohibiting any survivor from dealing with his or her own property, where the residuary beneficiaries are relatives, the parties to a mutual will are deemed not to have intended to deprive the survivor of the use of the property to which he or she holds title, for proper purposes, such as **his or her support or comfort**. [FN8] Where spouses, by mutual wills, provide for the disposition of the residuary estate of each to the other, and, on the death of the survivor, to the children, the surviving spouse, after the other spouse's death, is entitled to use as much of the assets of their joint estates during his or her lifetime as he or she requires. [FN9] However, **the surviving spouse cannot make a gift in the nature, or in lieu, of a testamentary disposition, or to defeat the purpose of the agreement.** [FN10]

With respect to a surviving spouse's disposition of property in a manner at variance with mutual wills, the lodestar is the intention of the parties. [FN11] **The disposition during the lifetime of a surviving spouse, if not prohibited, must be reasonable**. [FN12]" (Emphasis Added)

In 79 Am Jur 2d Wills, it is stated:

79 Am Jur 2d Wills "§688. Disposal of property by party during lifetime

* * * * *

"The courts do not assume that the parties to a joint and mutual will intended to restrict either party from disposing of property in **good faith** by **transfers** effective during his or her lifetime, unless a plain intention to this effect is expressed in the will or in the contract pursuant to which it was executed. [FN10] Nothing short of plain and express words to that effects in a contract to execute wills with mutual and reciprocal provisions is sufficient to prevent one of the testators from disposing of his or her property in **good faith** during his or

her lifetime, notwithstanding the death of the other testator. . ." (Emphasis Added)

79 Am Jur 2d Wills "§720. Nature or quantum of estate or interest created

* * * * *

"**A clause in a will executed by two testators, bequeathing the property to the survivor without expressly defining the estate to be taken by the survivor, does not convey a fee simple if a subsequent clause contains a devise over after the death of the surviving testator, at least not if the intent of the testators apparent from the whole instrument is to the contrary**. . .

Giving effect to the contract under which a will was executed jointly by two testators, there is no repugnancy between an absolute devise in fee simple made in an early paragraph of the will to the surviving testator and a subsequent paragraph that directs the division of what remains of the estate upon the death of the surviving testator between children of the testators named specifically. [FN3]" (Emphasis Added)

Finally, Appellants would refer the Court to the annotation in **85 ALR 3d 8** entitled "Right Of Parties To Joint Or Mutual Will, Made Pursuant To Agreement As To Disposition Of Property At Death, To Dispose Of Such Property During Life." Specifically:

"**I. Prefatory Matters**

§1[a] Introduction--Scope

* * * * *

"Except where it appears in quotation marks to indicate court usage, the term "mutual" will or wills is used throughout this annotation to refer to a joint will or separate wills executed pursuant to an agreement to dispose of the parties' property in a particular manner. Thus, if a will is referred to as a "mutual will," it either indicates that the court has referred to it in that manner, or that the court has found that it was based upon a contract. . . (Pages 12,13)

* * * * *

"**§2[a]** Summary and comment -- Generally

* * * * *

"Most of the cases discussed in this annotation involved the authority of the surviving party to make an inter vivos disposition of the property after the death of the other

party. **It is a general rule that the surviving party to a joint or mutual will agreement, having accepted the benefits thereof upon the death of the other party or parties, has no right to dispose of the property differently than contemplated by the agreement.** [FN16] As stated above, the survivor's power to dispose of the property is ordinarily a question of the parties' intentions in this regard.

Where the joint or mutual will, or the agreement executed in connection therewith, leaves the property to the survivor in fee simple, giving whatever might remain at the survivor's death to others, the survivor is ordinarily allowed to make any good-faith inter vivos disposition of the property which he may desire. [FN17] **But even though the property is expressly given to the survivor in fee simple or words to that effect, if specific property is then given, upon the death of the survivor, to named beneficiaries, it has been held that the survivor has no authority to make any other disposition of that property.** [FN18]" (Page 15) (Emphasis Added)

* * * * *

"**If a joint or mutual will**, or its agreement, **does not expressly prohibit the survivor from making inter vivos disposition of the property** (the property being left to the survivor, then to named beneficiaries, without further explanation of the survivor's interests), and the will does not leave specific property to the beneficiaries, **some courts have held that the survivor is free to dispose of the property as the survivor may see fit**, at least **if done in good faith**, even though it may leave nothing for the third-party beneficiaries. [FN22] **But other courts consider the failure to define the survivor's power to dispose of the property as a restriction upon the survivor's authority to make an inter vivos disposition.** [FN23] It must be emphasized, however, that those cases in which the courts permitted the survivor to freely transfer the property did not involve devisees or bequests of specific property which the survivor had attempted to dispose of differently than contemplated by the agreement. [FN24]" (Pages 15-16) (Emphasis Added)

* * * * *

"It is generally held that regardless of the interest given to the survivor in a joint or mutual will, as long as there is no express provision to the contrary, the survivor has power to dispose of the property for necessities, support, and maintenance. [FN30]" (Page 16)

* * * * *

"**Regardless of the wording of a joint or mutual will, or the accompanying agreement, if property is left to third-party beneficiaries who are to take upon the death of the survivor, most courts consider any inter vivos transfer made by the survivor with an intent to avoid the agreement, to be improper.** [FN34] In this regard the good faith behind transfers of a testamentary nature--such as the conveyance to another reserving a life estate--have been treated with skepticism by most courts. **Gratuitous transfers**, especially when they involve sizeable portions of the estate, **have also been**

viewed as efforts to avoid the agreement." (Page 17) (Emphasis Added)

* * * * *

". . . **Property owned by two parties in joint tenancy, by the entireties, or as community property, goes to the survivor under ordinary circumstances**.[FN37] And property which a husband or wife owns in severalty remains that person's property on the death of the spouse. **But when two parties who own property in severalty, by joint tenancy, by the entireties**, or as community property, **join in executing a joint or mutual will under an agreement whereby all property is to go to the survivor and upon the death of the survivor to named beneficiaries, just what the survivor takes is not settled**. If the parties make their intentions clear in the agreement or in the wills, the courts will abide by their intentions. But the parties frequently do not make their intentions clear, using language such as leaving "all of our property," or the like, to the survivor with the remainder to others. Such wording lends itself to various interpretations . . . **However, regardless of the interpretation, it is ordinarily held that property held in severalty by one of the parties, and property held in joint tenancy, by the entireties**, and community property held by both parties, **may all be subjected to the restrictions of a joint or mutual will**.[FN38] **Thus, property which the survivor would otherwise hold in fee simple may be reduced to a life estate or less by a joint or mutual will agreement, thereby imposing a corresponding restriction upon the survivor's authority to make an inter vivos disposition of that property.**

Although surviving parties to joint or mutual wills have attempted to dispose of property from the estate in a variety of ways,[FN39] their right to do so, it is held, depends upon the intentions of the parties to the agreement. The basic question, therefore, remains the same, no matter how the issue is raised. As has been said by one court, assuming the validity of a mutual will contract, the question becomes one primarily of the intention of the parties. Did they intend by the agreement, and the joint or mutual will executed pursuant thereto, to impose a limitation upon their right, or that of the survivor, to dispose of the property during life, or was their intention merely that ownership and control should remain unaffected thereby during their lifetimes, and that the property remaining at their death should pass in a designated way?[FN40]" (Pages 17, 18) (Emphasis Added)

* * * * *

"**IV. Restrictions on survivor's power to make inter vivos transfers**

§21. Transfers in avoidance of contract or will

Regardless of the wording of a joint or mutual will, or the accompanying agreement, if property is left to third-party beneficiaries who are to take upon the death of the survivor, most courts consider any inter vivos transfer made by the survivor with an intent to avoid the agreement, to be improper. " (Page 59)

ISSUE III.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE REAL PROPERTY IN QUESTION WAS NOT COVERED BY THE COUPLE'S WILL CONTRACT AND INSTEAD AUTOMATICALLY PASS TO THE HUSBAND OUTSIDE OF HIS WIFE'S WILL BY VIRTUE OF HIS SURVIVORSHIP RIGHTS OF THEIR JOINT TENANCY?

Appellants assert the answer is, "Yes."

Appellees assert the answer is, "No."

The Court of Appeals assert the answer is, "No."

At the time of executing their Wills, the VanCONETT's were the owners of real property they had acquired in June, 1956, taking title as "Herbert L. VanConett, Ila R. VanConett and Florence H. VanConett, as joint tenants with full right of survivorship and not as tenants in common." (***Appendix 35a***) Florence H. VanConett died 4-16-1967. (***Appendix 87a***) HERBERT VanCONETT conveyed the title to this property to Defendant DURUSSEL by Quit-Claim Deed, dated 5-31-1996. (***Appendix 36a***)

It is Appellants' position that the Wills of both HERBERT L. VanCONETT and ILA R. VanCONETT referenced an agreement between themselves for the purpose of disposing all of their property which included this real estate. Specifically, the Will of ILA R. VanCONETT contained the following provision:

> "I hereby expressly acknowledge that this Will is made pursuant to **a contract** or agreement entered into between my husband, HERBERT L. VanCONETT, and myself **for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty**, in the manner hereinabove in this, my Last Will and Testament, ..." (Emphasis Added) (***Appendix 9a***)

HERBERT's Will contained the following provision:

"I hereby expressly acknowledge that this Will is made pursuant to a contract or agreement entered into between my wife, ILA R. VanCONETT, and myself **for the purpose of disposing of all our property, whether owned by us as joint tenants, as tenants in common or in severalty**, in the manner hereinabove in this, my Last Will and Testament. . ." (Emphasis Added) (***Appendix 7a***)

The Court of Appeals, however, disagreed finding that the real property passed outside of Ila's Will, was not part of her estate and not covered by the couple's contract to make a Will. In this regard, the Court stated:

"We disagree with plaintiffs' argument that the probate court erred in finding that the real property passed outside Ila's will. Property held as joint tenants with full rights of survivorship automatically passes to the surviving tenant(s) at a tenant's death. 1 Cameron, Michigan Real Property law (2d ed), § 9.11, pp 306-307. Because title passed instantly at Ila's death, it would not have been part of her estate and would not be covered by the couple's contract to make a will. Therefore, the estate has no right to seek its return. This is true even though the VanConetts' wills purported to apply to "all our property, whether owned by us as joint tenants, as tenants in common or in severalty." Certainly, the VanConetts could not destroy the survivorship right through their wills because a will has no effect until the testator's death. The VanConetts' contract to make a will did not expressly indicate that the couple wished to terminate their joint tenancy and destroy the survivorship rights attached to it. No authority suggests that merely expressing a desire to end a joint tenancy carries out the task of terminating a joint tenancy with rights or survivorship. Therefore, we conclude that the VanConetts' wills did not terminate the survivorship rights of their joint tenancy. The property passed to Herbert immediately at Ila's death and the estate lacked standing to seek its return to the estate." (***Appendix 185a, 186a***)

Appellants would assert that such a ruling is

(a) contrary to Michigan law,

(b) contrary to the express intent of the parties as expressed in their respective Wills, and

(c) contrary to the law of the majority of other states which have addressed this issue.

CONTRARY TO MICHIGAN LAW

The Court of Appeals ruling that jointly titled real property is not covered by a mutual Will contract is contrary to

Schondelmayer v. Schondelmayer, 320 Mich 565; 31 NW2d 721 (1948). In that case, the joint mutual Will of the parties provided that the ownership to all of their property first go to the surviving spouse and upon the survivor's death, then to their three sons. (Page 568) The title to the real property which the three sons were to receive was held by the parties *"jointly in entireties"*.(Page 568) In that case, the Court ruled this real property was subject to the parties' contract. (Page 575)

CONTRARY TO PARTIES EXPRESS INTENT

In Michigan, there are only three ways title to real property can be held, i.e. in severalty, in joint tenancy, or in common. MCL 554.43 specifically provides as follows:

> "**Estates**, in respect to the number and connection of their owners, **are divided into estates in severalty, in joint tenancy, and in common**; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter." (Emphasis Added)

The provision in each of the parties' Will describes what property is included in "all our property" and includes all three methods of holding title. Specifically, the language in each Will states, "all our property, whether owned by us as joint tenants, as tenants in common or in severalty. . ." Clearly, the parties' agreement encompasses this real estate.

The Court of Appeal's ruling totally disregards what has long been Michigan law and that is, ". . .it is entirely competent for a person to make a valid agreement binding himself to make a particular disposition of his property by last will and testament." ***Bird v. Johnson, 73 Mich 483, 492; 41 NW 514 (1889)*** In this case, the parties by contract bound each other to a certain

disposition of "**all our** property, whether **owned by us as joint tenants**, as tenants in common or in severalty". (Emphasis added) (***Appendix 7a, 9a***)

The parties' intent is clear. Their Will contract applies to **all** of their property and specifically includes property "**owned by us as joint tenants**". They owned the subject marital realty as "joint tenants" prior to executing their separate mutual Wills. (***Appendix 35a***) To say this realty is not covered by the parties' contract is to totally disregard the express language of the parties' mutual Wills and clear expression of their intent.

CONTRARY TO THE LAW OF OTHER STATES

In ***First United Presbyterian Church v. Christenson, 64 Ill 2d 491, 1 Ill Dec 344; 356 NE 2d 532 (1976)***, a husband and wife had executed a joint and mutual will disposing of all their property, including realty held as joint tenants. In holding the will contract bound this joint property, the Court stated:

> ". . . the contractual agreement in the joint and mutual will did not sever the joint tenancy in the real estate; that the defendant, as surviving joint tenant, took title to the real estate by operation of law and not under the will. . ."
>
> * * * * *
>
> "Although title to the real estate held in joint tenancy does not pass under a joint mutual will. . .such real estate can be the subject of a contractual agreement contained in a joint and mutual will and a court of equity, under appropriate circumstances, will enforce the agreement and limit the surviving joint tenant's disposition of the property. . . Paragraph "Lastly" of this will provided explicitly that the testators had entered into an agreement for the express purpose of disposing of all of their property "whether owned by us as joint tenants, as tenants in common or in severalty, * * *" and plaintiff, as the third party beneficiary of the contract contained in the joint and mutual will, is entitled to enforce the contract." (Page 535)

***In Re Estate of Bell*, 6 Ill App 3d 802; 286 NE2d 589 (1972)**, the Illinois Supreme Court also applied public policy as a basis for holding that jointly owned property of two testators was controlled by their mutual wills stating:

> "This was an equitable arrangement and we do not feel that it should be disturbed after the death of one testator by creation of new joint tenancies by the survivor from property which was received from a joint tenancy previously established by both testators. In this regard, the situation here presents in effect a family settlement which should be "* * * especially favored on grounds of public policy upholding the honor and peace of families." (Page 591)

In an earlier Illinois decision, ***Tontz* v. *Heath*, 20 Ill 2d 286, 170 NE 2d 153 (1960)**, the fact that most of a couple's property was jointly owned was the basis for ruling such property was covered by the parties' mutual Will. The Court stated:

> "The language of the instrument and the circumstances of the parties in this case show that they intended to include their jointly owned property in the contract. The will disposes of "all" of the property that the testators "now own or shall hereafter acquire" to the survivor for "the term of his or her natural life." . . .The apparent purpose of this agreement . . .would be largely nullified if the agreement did not embrace the property held in joint tenancy, because this property constituted most of the testators' wealth. We see no basis for an interpretation that would exclude the jointly owned property." (Page 157)

In ***Wagner* v. *Wagner*, 395 NYS 2d 641 (1977)**, a husband and wife had executed a joint Will leaving all their property first to the survivor and upon the survivor's death, to their children. The Will did not expressly impose a restriction on the disposition of property during the lifetime of the surviving spouse. (Page 642) After the wife's death, the husband remarried and conveyed property he had jointly owned with his first wife to he and his second wife as tenants by the entirety. (Page 642) The Court in setting aside such transfer finding it was violative of the parties' joint Will,

stated:

> "We have noted that the Clarendon Road property sold by Raymond was property which he and his deceased wife held as tenants by the entirety. The general rule is that "an estate by the entirety can be conveyed or encumbered only by the joint deed or consent of husband and wife, and neither can, without the consent of the other, convey or encumber any part of an estate by the entirety so as to affect the right of survivorship in the other" . . .but where either a husband and wife survives, such survivor may dispose of the property as he or she sees fit. However, in this case, we recognize a restriction on the right of the survivor Raymond to make an unfettered disposition. By our decision we do not hold that the rule as to disposition of properties owned by tenants by the entirety is changed. We merely say that a husband and wife who are tenants by the entirety may, by joint will containing an exchange of promises, provide for the ultimate disposition of property held by them as tenants by the entirety." (Page 644)

In an earlier decision, ***In Re: Estate of Rothwachs, 57 Misc 2d 152, 290 NYS 2d 781 (1968)***, a provision in a couple's joint will making their will irrevocable was the basis for holding jointly owner property covered by said joint will:

> "'While neither a husband nor a wife can dispose of property owned by them as tenants by the entirety so as to affect the right of survivorship, they may do so by acting in concert or by a joint will, or by a contract.'
>
> **Such a binding agreement is established when the joint will expressly contains an agreement that it will not be revoked.**
>
> * * * * *
>
> Since the will establishes a contractual agreement that the survivor shall not make a new will, the contract revoked the outright absolute * * ownership of the jointly held property which normally would come into existence by operation of law on the death of the first spouse." (Pages 785,786) (Emphasis Added)

Like the Illinois Courts, New York Courts also recognized that the parties' agreement would be nullified without embracing jointly held assets. In ***Rubenstein v. Mueller, 19 NY 2d 228, 225 NE 2d 540 (1967)***, a husband and wife executed a joint Will providing all of their property go to the survivor and on the

survivor's death to certain named beneficiaries. Upon the wife's death, the husband remarried creating a new Will naming his second wife sole beneficiary. (Pages 541-542) Holding that the jointly held property was subject to the contract, the Court stated:

> "The bulk of the property involved did not come to Mueller under the joint will. His interest in the real property, for example, commenced as a tenant by the entirety, ripening into sole ownership through his surviving his first wife. Similarly, his formal title to most of the personalty, consisting of savings accounts, derived from his surviving Bertha, with whom he had these joint accounts. . . For all practical purposes, equity may content itself with considering the assets at their collective property, as if their estates had merged.
>
> As to this collective property we feel that, on the death of one party to the joint will, the survivor was bound by the mutual agreement that the named beneficiaries should receive the property remaining when the survivor died. . . The survivor's right to full ownership of the collective property is transformed and modified by this joint agreement, effective upon the other's death as stated above, into but an interest during the life of the survivor with power to use the principal. "While neither a husband nor a wife can dispose of property owned by them as tenants by the entirety so as to affect the right of survivorship, they may do so by acting in concert, as by a joint will, or by a contract." . . . After Bertha's death, then, the property received by Conrad was his but subject to an interest enforceable specifically as to so much of it as he did not consume during his lifetime." (Pages 543,544)

In ***Lawrence v. Ashba, 115 Ind App 485, 59 NE 2d 568 (1945)***, a husband and wife each executed separate but mutual Wills in which they left all of their property first to the survivor spouse "absolutely and in fee simple" and upon his or her death to their three children equally. After the wife died, the husband remarried and conveyed to his new wife the real estate that had previously been in he and his first wife's name as tenants by the entirety. (Page 570) In setting aside the conveyance, the Court stated:

> "We agree with appellants that upon the death of a wife the husband takes all of their real estate held by entireties regardless of any attempt by the wife to make any disposition of it by testamentary devise. . . and so in this case it must be held that he took title to the real estate by operation of law and not as any result of the will. But we do not agree that the contract under consideration could not operate upon real estate so acquired by Mr. Lawrence.

. .In this case the parties also contracted with reference to real estate so held. Mr. Lawrence did not agree to leave to the appellees only the property he would take under the will of his wife. His agreement was that if his wife died before he did, he would leave to appellees *all* of his property. . ." (Page 571)

". . .it seems clear the parties intended that the survivor should have the use and benefit of the property for life, he to have the right to dispose of any or all of the corpus of the estate for his reasonable needs in the event the income should be inadequate for that purpose, but he could not dispose of it to defraud and defeat his obligation." (Pages 571,572)

In ***Jennings v. McKeen, 245 IO 1206, 65 NW 2d 207 (1954),*** a husband and wife executed a joint Will leaving all of their property to the survivor thereof and upon death of that survivor to various named beneficiaries. The testators owned a large amount of real estate in joint tenancy. The husband died and the wife subsequently executed a new Will and also conveyed to two of her grandchildren all the real estate she and her husband had previously owned in joint tenancy. (Page 208) The Court found that "the widow after her husband's death, accepted benefits under his will, consisting of personal property. . . as well as a part of the real estate not held in joint tenancy." (Page 210) In finding the jointly held property was covered by the parties' will contract, the Court stated:

"The fact that a large part of the property was held by testators in joint tenancy does not prevent application of the contractual theory. Undoubtedly joint tenants may contract with each other in respect to the joint owned property. 48 CJS Joint Tenancy, §10.

. . .That the survivor became owner by virtue of the joint tenancy is immaterial so long as she received benefits under the will sufficient to constitute a consideration to support the contract. . .

. . .After death of Alfonso L. McKeen the contract became irrevocable and binding upon Rose McKeen. She could not thereafter give her property away in defeat of it." (Page 211)

In ***Stewart v. Shelton, 356 Mo 258, 201 SW 2d 395 (1947),*** a husband and wife executed a joint Will leaving all of their property, i.e. 320 acres of land held in their names as tenants by the entirety, first to the survivor and upon the survivor's death, to be divided equally among their combined eight brothers and sisters. After the husband's death, the wife executed four deeds conveying 80 acres each to two of her brothers and their sons. (Pages 396,397) The Court framed the issue before it as follows:

> "It is next contended that estates by entirety are not subject to testamentary disposition of the character here made. This brings us to the heart of the controversy presented. Was the estate of testators held by entirety a proper subject matter of such a joint will? Did J. T. Stewart and Josie Stewart agree between themselves in substance as follows: 'Regardless of which one of us died first, your brothers and sisters and my brothers and sisters shall each receive an equal share in our joint property,' and was the will thereafter drawn on August 6, 1943, executed pursuant to that agreement? We think these questions must be affirmatively answered.
>
> We are cited to no authority and we do not find any that an estate held by entirety may not be devised under the circumstances shown by the instant facts. Nor upon principle do we see any reason why a husband and wife may not under these circumstances make joint testamentary disposition of an estate by entirety. . . The essential characteristic is that each spouse is seized of the whole or entirety and not of a share, moiety or divisible part. While neither spouse has any right, title or interest which may be conveyed, encumbered or devised by his or her *sole* act, and while one spouse acting alone cannot defeat the right of the other to take the entire estate as survivor, or do anything to affect the right of survivorship, yet by agreement and joint act the two by will may devise a remainder over after life enjoyment by the surviving spouse. . . In the instant case neither spouse acting separately and alone did anything to impair the full enjoyment, present or future, of the other. Acting jointly, as they could and did do, the husband and wife merely agreed by their joint will that after they both were deceased that their estate held by them by entirety should go to all of the brothers and sister of the two of them. That they had full power to do." (Page 398)

In ***Flohr v. Walker, (Wyo) 520 P2d 833 (1974),*** a husband and wife executed a joint and mutual Will giving everything first to the survivor and upon the survivor's death, to their daughter. After the wife's death, the husband executed a new Will preventing

the daughter from receiving any of his estate. (Pages 833, 834) In holding that the jointly held property was covered by the parties' contract, the Court stated:

> "...the circumstance that all of the Walkers' property at the time the will was executed and until Mrs. Walker's death was in joint tenancy with the right of survivorship, although standing alone might have served to transfer the property to him at the wife's death, did not free him from the obligation of the joint, mutual, and contractual will the benefits of which flowed originally to the wife, then to the daughter, and on her death to Flohr." (Page 838)

Finally, in ***Estate of McKusick, (Me) 629 A 2d 41 (1993)***, a husband and wife executed a joint Will providing that all property owned by either of them, including joint tenancy property, would pass to the survivor and after the death of the survivor to the husband's two daughters from a previous marriage. After the husband's death, the wife deeded the property to herself and others jointly. (Page 41) The Court impressed a trust on the deeded property for the benefit of the husband's two daughters from a previous marriage, stating:

> "Small argues that Anna McKusick was free to dispose of the land that she had held with her husband in joint tenancy because, on Harl's death, that property did not become part of his estate and thus was not subject to the restrictions of the joint will. Although it is true that on her husband's death Anna acquired exclusive legal title to the property by operation of her deed rather than through her husband's estate, Anna was not free to dispose of that property. She had relinquished that right when she and her husband executed the joint will ..." (Page 42)

For the reasons stated above, Appellant asserts that the Court erred in ruling that the real estate in question passed outside of probate by virtue of the joint tenancy created and was not covered by the parties' Will contract.

ISSUE IV.

DOES THE MERE FACT THAT HERBERT AND ILA VANCONETT ENTERED INTO A MUTUAL WILL IMPOSE RESTRICTIONS ON THE SURVIVING SPOUSE'S POWER OF DISPOSAL DESPITE THE ABSENCE OF EXPRESS CONTRACTUAL OR TESTAMENTARY LIMITATIONS ON THE POWER OF ALIENATION?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Appellants assert the answer is, "Yes."

"Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions, or wills executed in pursuance of a compact or agreement between two or more persons to dispose of their property, to each other or to third persons, in a particular mode or manner..." ***In re Thwaites Estate, 173 Mich App 697, 702; 434 NW 2d 214 (1988)***

"The role of the Probate Judge is to ascertain and give effect to the intent of the Testator as derived from the language of the Will. . . . Absent an ambiguity, the Court is to glean the testator's intent from the four corners of the testamentary instrument." ***In re McPeak Estate, 210 Mich App 410, 412; 534 NW 2d 140 (1985)***

In the instant case, each VanConett Will contained a reciprocal contract provision. Specificially, the Will of HERBERT L. VanCONETT contained the following provision:

> *"I hereby expressly acknowledge that* ***this Will is made pursuant to a contract*** *or agreement entered into between my wife, ILA R. VanCONETT, and myself* ***for the purpose of disposing of all our property****, whether owned by us as joint tenants, as tenants in common or in severalty,* ***in the manner hereinabove in this, my Last Will and Testament****, provided,* ***and*** *I expressly declare that* ***in the event my wife, ILA R. VanCONETT, shall predecease me,*** *then and in that event,* ***this my*** *Last* ***Will*** *and Testament* ***shall be irrevocable.***" (Emphasis Added) (***Appendix 7a***)

This provision clearly indicates the parties' intention that all Will provisions be binding on the surviving spouse. The use of the words, "all **our** property, whether owned by us as joint tenants, as tenants in common or in severalty" also clearly indicates the parties' intention

that it cover the joint disposition of their collective property and not the independent disposition by each of his or her own separate property.

Appellants would assert that if no restrictions are imposed upon the survivors' power to use and dispose of the parties' property, then the parties' reciprocal contract provision would have no meaning and the mutual Wills would be reduced to ordinary Wills.

What distinguishes mutual Wills from ordinary Wills is this contract provision - a provision which deals with the disposal of the parties' property not only upon the death of the first party but upon the death of both parties.

The parties' intention that their respective Wills would be "irrevocable" upon the first of them to die, would be rendered meaningless if the survivor could just give away or use the property covered by the agreement in a manner which defeats the purpose of the agreement. It cannot reasonably be said that ILA VanCONETT believed her husband had the right - commencing the moment of her death - to nullify the gift over of their property to the designated beneficiaries of his Will by:

(a) gifting or giving it away;

(b) by disposing of it by deed operating as a testamentary disposition or;

(c) by placing it in non-probatable assets by joint and survivorship agreement.

That is exactly what he did.

A Will has to be construed as a whole and interpreted by giving meaning to all of its provisions without destroying the purpose which the Will was made to accomplish. Other states have applied this basic principal of will construction to impose restrictions on a surviving spouse by virtue of the parties' mutual Will.

In ***First United Presbyterian Church*** v. ***Christenson***, ***(Ill case) supra***, the parties had executed a joint and mutual will that left "all the rest, residue and remainder of our estate" to the survivor, and also provided that after the death of the survivor, whatever remained would go to various beneficiaries. (Page 534) The contract provision in that case is very similar to that of the VanCONETT's. Specifically, that Will stated:

> "Lastly: This joint will is made in pursuance of a contract or agreement between us for the purpose of disposing of all of our property, whether owned by us as joint tenants, as tenants in common or in severalty, in the manner hereinabove, in this, our Last Will and Testament provided." (Page 534)

The Court indicated:

> "A considerable number of cases have come before this court where an estate is given to one person in general terms without express language, such as 'for life' or 'in fee simple', defining the estate in the first taker followed by subsequent language in the same or another sentence, paragraph or clause of the will giving the property to another 'when', 'at', or 'on' the death of the first taker." (Page 536)

The Court stated "...in applying the simple rule of interpretation that an instrument will be given effect in all its parts" held that the first taker takes only a life estate, "since to hold otherwise would make all the language of the gift over meaningless." (Page 536)

In ***Fitch*** v. ***Oesch***, ***30 Ohio Misc 15; 281 NE2d 206 (1971)***,

a husband and wife executed a mutual Will agreement whereby all property went to the survivor and at the death of the survivor, one-half to the husband's nieces and nephews and one-half to the wife's nieces and nephews. The wife executed a Will in accordance with that agreement. The husband died first and the wife later made a Codicil to her Will in which she left a farm and residence in trust for one, Lawrence Oesch, and upon his death to his children. In addition, she turned all the bank accounts and insurance into non-probated assets by joint and survivorship agreements with not only the parties' nieces and nephews but other of her relatives. (Page 208) The Court found that the agreement was enforceable by law (Page 208) and further indicated:

> "An agreement of this sort is peculiarly subject to the protection of the court. One of the parties had died and therefore has no way to seek enforcement of the agreement. To say that she has a right, out of her property, in view of the agreement, to dispose of any property in any way except by the agreement, by joint and survivorship accounts or by free gift, and also in this case by codicil to her will, is to say that the agreement for all practical purposes is not to be enforced. It is a logical conclusion that anyone can for all practical purposes abrogate with impunity this agreement if they can make gifts of the property as they see fit or to place it in bonds or such so that the effect of the agreement becomes null and void. If such be the case, then these agreements are of no value and the agreement would be able to be abrogated with impunity by the survivor by use of the law on joint and survivor accounts or by gift to dispose of the property.
>
> Therefore the court rules that the agreement is binding on Lela Oesch and she could neither by the contrivance of joint and survivor accounts, or bonds or by codicil to will, dispose of her property in any other way than under the agreement of December 27, 1963 . " (Page 208)

In ***Heller*** *v.* ***Heller****, (Tex Civ App) 233 SW 870 (1921)*, a husband and wife had executed a joint Will which read as follows:

> "IX. After the demise of both of us . . . all of the then remaining property, both real or personal property, shall be equally divided between our children. . .

"X. The survivor of either of us. . . shall have the right to sell or otherwise dispose of any part of our community property and invest the proceeds of such sale or disposition as he or she may think best." (Page 870)

After the husband's death, the wife conveyed 147.25 acres of land to a son for $10.00. (Page 870) In setting aside the deed, the Court construed the Will as follows:

"Section 10 of the will before set out expressly authorized Mrs. Heller to sell or otherwise dispose of any part of the community property and to invest the proceeds of sale or to make such disposition as she might deem best. While the general power of disposition of the property conferred by this section of the will considered alone is unrestricted, the will must be construed as a whole, and this provision should not be construed as authorizing Mrs. Heller to give or devise the property or any portion of it contrary to the express provisions of section 9 of the will, which directs that upon the death of both of the testators all of the property shall be equally divided between all of their children.

To give section 10 a construction which would authorize Mrs. Heller to give the property to one of these children would defeat the manifest purpose and intention of the testator as evidenced by the will as a whole, and it should not be so construed." (Pages 871-872)

In ***Klooz v. Cox, 209 Kan 347, 496 P 2d 1350 (1972)***, a husband and wife executed a joint and mutual will which provided that upon the death of the first testator, all property "shall be the sole property of the one who survives. To be used at their own discretion." (Page 1351) After the husband's death, the wife gifted monies to others by depositing them into joint tenancy accounts. The holders of those accounts argued that the Will language put "no restriction" on the right to dispose of property. (Page 1351) The Court held otherwise, stating:

"Language in a contractual will defining the powers and rights of the survivor as to property affected by the will and in his hands, must be subordinated to the basic purposes of the contract." (Page 1351)

In ***Sample v. Butler University, 211 In 122, 4 NE 2d 545***

(1936), a husband and wife had executed mutual Wills leaving to the survivor all property which the survivor "may own at the time of my death" to a university upon condition that the income therefrom be given to the wife's daughter and husband's son for life. (Page 546) The Court held that by use of the above quoted words the parties did not intend to authorize the survivor to dispose of all of the joint property in any manner and for any purpose during his lifetime. The Court held "such a construction does violence to the very agreement which the wills were made to carry out..." (Page 548) The Court stated that it was clear that the parties intended that the survivor should have the use and benefit of their joint property for life but "that any other construction would result in imputing to the parties an intention to destroy the very contract which the wills were made to carry out." (Page 548)

Appellant would assert that a reading of the parties' Will shows a clear intent to give "all the rest and residue of my estate" to the surviving spouse alone. But it is also apparent that subject to that provision, it was the parties' intent that any assets not consumed during the survivor's lifetime was to pass upon his or her death to the designated beneficiaries. The whole purpose of the Will contract was to accomplish this goal. The gift over upon death of both spouses has no meaning unless this provision is interpreted as placing some type of restrictions upon the survivor's right of disposal of said assets during his lifetime.

It does violence to the contract itself to hold that the mutual Will contract is valid and binding and at the same time hold

that the survivor might dispose of all the property by giving it away or placing it in non-probate assets so as to prevent the ultimate beneficiaries named in the contract from realizing the bequest which was expressly intended for their benefit after the death of the survivor.

For all of the above reasons, Appellants assert that the mere fact HERBERT and ILA VanCONETT entered into a mutual Will imposes restrictions on the surviving spouse's power of disposal despite the absence of express contractual or testamentary limitation on the power of alienation.

ISSUE V.

WHAT IS THE SOURCE AND NATURE OF SUCH A RESTRAINT IF IT IS CONTENDED THAT HERBERT VANCONETT WAS SO RESTRAINED FROM DISPOSING OF HIS ESTATE?

(Issue to be briefed per Order Granting Application for Leave to Appeal)

Following his wife's death, HERBERT VanCONETT conveyed the fee title to the parties' marital home to his neighbor, Defendant DuRUSSEL, for $1.00 and reserved unto himself a life estate. (***Appendix 36a***) HERBERT VanCONETT also gave away, gifted and by use of joint and survivorship accounts disposed of a considerable portion of their property to Defendant LEIDLEIN. It is Appellants' position that said acts were in violation of the parties' mutual Will contract despite the fact the mutual Will did not contain any restrictions on his lifetime power of alienation.

SOURCE OF RESTRAINT

Appellants assert the source of restraint on HERBERT VanCONETT's disposition of his estate is three-fold:

(1) The implied condition of good faith found in all contracts;

(2) The intention of the parties gleaned from the four corners of the will; and

(3) The equity power of a Court.

(1) IMPLIED CONDITION OF GOOD FAITH

It is a basic precept of contract law that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement." ***Flynn v. Korneffel, 451 Mich 186, 213, n 8; 547 NW2d 249***

(1996) (Levin, J., dissenting); ***Stark*** *v.* ***Budwarker****, Inc, 25 Mich App 305, 313, n 7; 181 NW 2d 298 (1970)* This "good faith and fair dealing" element of all contracts dictates that there be a restriction on a spouse's power to dispose of that property in a manner which neither defeats the purpose of the agreement nor is inconsistent with the intent of the parties as evidenced in their separate mutual Wills. The Court's remarks in ***George*** *v.* ***Conklin****, 358 Mich 301; 100 NW2d 293 (1960)*, that "It is scarcely conceivable that either party, at the time the joint will was executed, contemplated that the survivor might defeat the expressed purpose of both parties as to the final disposition of their property." (Page 306) is equally applicable to this case.

Courts in other jurisdictions have imposed this "good faith" duty on parties in mutual Will cases. ***In re Estate of Chayka****, 47 Wis 2d 102, 176 NW 2d 561 (1970)*, a husband and wife executed a joint Will giving the property to the survivor and providing that on the death of the survivor that the property would go to a named third person. The husband died first. The wife subsequently remarried and transferred to her second husband as gifts much of the real and personal property awarded her under the Will of her first husband. (Page 562-563) The Court held that such transfers were a violation of the joint will agreement and stated:

> "This. . . appeal asks whether the survivor of the two contracting parties may give away the property received by her under the joint will, thus defeating the intent of the mutual agreement and joint will that such property of the survivor shall go to the person designated by the agreement. We answer that transfer by gifts inter vivos of a substantial portion of the property received under the joint will must be held to be violative of the agreement of the parties and as a matter of law not made in good faith." (Page 563)

"Appellant contents that Evelyn Flanagan Chayka complied with her agreement with her first husband by leaving unrevoked the will giving all of the property she possessed at the time of her death to Robert W. Flanagan. This, as another court has well stated it to be, is "a mere play upon words." What she in fact has done has stripped nearly all of the flesh from the bones, leaving only a skeleton for testamentary disposition to Robert W. Flanagan. This is a compliance in form, not in substance, that breaches the covenant of good faith that accompanies every contract, by accomplishing exactly what the agreement of the parties sought to prevent."

* * * * *

". . .The duty of good faith is an implied condition in every contract, including a contract to make a joint will, and the transfers here violate such good faith standard by leaving the will in effect but giving away the properties which the parties agreed were to be bequeath at the death of both to a designated party." (Page 564)

In ***Waters v. Harper, 69 Nev 315, 250 P 2d 915 (1952)***, a husband and wife executed a joint mutual Will which provided that upon the death of either all property would "go to the survivor to use the same as such survivor may see fit and become the property of said survivor absolutely" and then provided that any property "which may be owned by the survivor at his or her death" should go to the four children of the parties. (Page 916) The wife died and the husband subsequently deeded the parties' home to his housekeeper "in grateful appreciation for the services rendered to me." (Page 916) In cancelling and setting aside the deed, the Court stated:

"It is elementary that parties may bind themselves to leave property in an agreed manner . . . What is not clear is whether that agreement precluded alienation of estate property by the survivor during his lifetime. The will contains no express prohibition of alienation." (Page 916)

* * * * *

". . .The essential question in our view is whether the transfer here considered can be characterized as one in good faith. . . The testator, having contracted against testamentary disposition save in the agreed manner, can hardly be said to have acted in good faith if the purpose of the alienation was to defeat the agreement by transfer in lieu of testamentary disposition. . .

* * * * *

That determination has been made by the trial court which expressly found as fact that the purpose of the alienation was to defeat the agreement. . ."

* * * * *

"All of this would tend strongly to indicate that Harper's true purpose in making the transfers was to effect, what then seemed to him under the circumstances then existing, a more proper and equitable division of his estate among those deserving recognition. This right, regardless of apparent justification for its exercise, no longer remained to him." (Page 917)

***In re Barnes Estate**, 64 Ohio L Abs 6, 108 NE 2d 88 (1950)*, a husband and wife executed separate but mutual Wills leaving all property to the survivor "with full power to sell and convey and to use the proceeds derived from the sale" as the survivor "may see fit" and the remainder to be divided equally among their brothers and sisters. (Page 93) The court held the survivor became a life tenant of the property and a quasi-trustee for the remaindermen, stating:

"While they can use and enjoy the estate to its fullest extent for their support, and consume the whole of it, if necessary, they cannot go beyond what would be regarded as good faith toward the remaindermen. . . It was aptly said in one case "The testator having so amply provided for the support of his wife, evidently contemplated good faith on her part towards his brothers and sisters. He therefore gave her the right to consume but not to recklessly squander or give away the estate." (Page 98)

In ***Bower** v. **Daniel**, 198 Mo 289, 95 SW 347 (1906)*, a husband and wife had executed a joint Will giving the survivor "the power of unrestricted disposition of the property." (Page 357) Upon the wife's death, the husband made conveyances without consideration of property to some of his children contrary to the terms of the Will. The Court in setting aside said conveyances stated:

"The court found that the testator and testatrix, when making the will, were disposing of the properties which they then owned, and by the terms of the will conferred upon the survivor the power of unrestricted disposition of the property embraced in the will; but that the testator, being the survivor, could only dispose of the property in good faith, and not merely

for the purpose of defeating the joint will in its operation upon himself." (Page 357)

In ***Brown v. Superior Court of Los Angeles County, 34 Cal 2d 559, 212 P2d 878 (1949)***, a husband and wife executed mutual Wills providing that half of their combined estate should go upon the death of the survivor, one-half to the relatives of each. Upon the death of the husband, the wife remarried and conveyed the property to her second husband. The Court upheld the first husband's right to enforce the Will contract, stating:

> "Where two parties agree to make mutual wills, each promising to dispose of his property to the other or, if the other be dead, to certain third persons, and one of the parties performs by leaving his property to the other, the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement. The contracting party who survives becomes estopped from making any other or different disposition of the property, and his obligations under the agreement become absolutely irrevocable and enforceable against him, at least where he avails himself of the provisions of decedent's will in his favor and accepts substantial benefits thereunder. . ."
>
> * * * * *
>
> ". . .It is not necessary, however, that there be an express agreement to this effect in order to enforce a contractual obligation to leave property to designated persons at death. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. . . Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed." (Pages 881-882)

Similarly, in ***Brewer v. Simpson, 53 Cal 2d 567, 2 Cal Rptr 609, 349 P2d 289 (1960)***, a husband and wife made mutual Wills providing that the property of the first to die would go to the survivor and all property of the survivor would then go one-half to the husband's relatives and one-half to the wife's relatives. The husband died and the wife subsequently remarried and transferred

all of her property to herself and her new husband in joint tenancy. (Page 291) In impressing a trust for the benefit of the Will beneficiaries, the Court stated:

> "Here, as in every contract, there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. . . Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. . . Also implied as part of the 'good faith and fair dealing' is a covenant of the survivor not to make unreasonable use of the property, as by conveying it all away so that the named third party beneficiaries will receive nothing." (Page 300)

Appellants would assert that all mutual Will contracts should be read and understood with the premise that they were entered into in good faith by both parties.

(2) THE INTENTION OF THE PARTIES

Appellants reiterate here the law and argument presented in Issue III "Contrary To The Parties Express Intent" (being Pages 19-20 of this Brief).

(3) EQUITY POWERS OF THE COURT

HERBERT VanCONETT received all his wife's property upon her death - be it jointly or separately held. Equity does not allow HERBERT VanCONETT to accept and receive the benefits of the mutual Will contract with his wife and then give him the power to dispose of that property in a manner that is inconsistent with the spirit of the agreement and/or not contemplated by their agreement. This equitable principle was the basis for the Court holding in ***Carmichael v. Carmichael, 72 Mich 76, 40 NW 173 (1988)*** and ***Smith v. Thompson, 250 Mich 302; 230 NW 156 (1930)***

In ***Carmichael, supra***, a husband and wife executed

separate Wills at the same time. At that time, the husband was the titleholder of 60 acres of land and his wife was the titleholder of 40 acres of land. (Page 80) The husband's Will devised to his wife the 60 acres of land during her lifetime. Upon her death, their son, Charles, would get 10 acres and the remaining 50 acres divided equally among two other sons and a daughter. The wife's Will devised to her husband her 40 acres during his lifetime. Upon his death, the land was to be divided equally among the above mentioned two sons and a daughter.

The husband died 6-28-1884. Up to that time, neither of their Wills had been revoked or altered. Subsequently on 8-18-1884, the wife conveyed by Warranty Deed her 40 acres to two of her other children, Hattie and Charles. That same day, Hattie and Charles then deed one-third of the same to Charles' son - all of whom were Defendants in this matter. The Complainants in this matter were the two sons and the daughter who were the beneficiaries of the 50 acres under the husband's Will and 40 acres under the wife's Will. It was the Complainant's position:

> ". . .that this disposition of the property was mutually agreed to by the father and mother, and that the inducement of Charles, Sr., to make his will as he did, was because of the promise of the defendant Ann Carmichael that she would make her will as she did; that each will was made and executed in pursuance of a mutual promise and agreement that each should be so made as aforesaid; and that, without said promise and agreement by the one to the other, neither of said wills would have been so made. " (Pages 80-81)

The Complainants sought to have the deeds set aside. (Page 82) The Court in finding for the Plaintiff and setting aside the deeds stated as follows:

> "We are further satisfied that the claim of complainants as to the contract is correct. We have no doubt from the two wills and their terms, and the oral evidence connecting them, that the father and mother came to a mutual understanding and agreement as claimed by the

complainants; that the wills were made for the express purpose of securing to complainants an equal undivided share of 90 acres of land, incumbered with the $500 bequest to Charles, Jr.; that the making of one will was an inducement to the making of the other, and that the contract and inducement of the father has been carried out and performed by his death with his will executed and standing as he promised . . ." (Pages 83-84)

* * * * *

". . . the contract on the part of the father has been fully performed, and that Ann Carmichael, the mother, has received and accepted the benefits of such performance. A court of equity, under these circumstances, will not permit her to rescind this contract. . . The nonfulfillment of this contract upon the part of Ann Carmichael would be a fraud which equity will not allow. Therefore it will decree the performance of the agreement upon Ann Carmichael, or take such steps as shall be necessary to prevent her from violating her part of the contract in fraud of the rights of these complainants." (Page 85)

In the case of ***Smith***, ***supra***, a husband and wife each made a separate Will, 3-2-26. In the husband's Will, he left his entire estate first to his wife and in case she should predecease him, a one-third to specifically named relatives of both he and his wife. The wife, in her Will, left her entire estate first to her husband, and in the event he predeceased her, a one-third distribution of her estate to the same relatives named in her husband's Will. (Page 303) The husband died 10-17-26. On 6-29-27, the widow made another Will revoking the former one and making a different distribution of her property. The wife died 1-8-28. The Plaintiffs, being the mother and sister of the deceased husband, filed a Complaint alleging that the Wills executed on 3-2-26 were pursuant to an agreement between the husband and wife and sought specific performance. The Court found both a contract and that the Plaintiffs were proper parties to enforce that contract. As the Court stated:

"It is conceded that none of the plaintiffs were present at the time the contract was made. The question presented is whether, when made for their benefit, they may enforce its provisions against the estate of the wife. The contract was a mutual agreement on the part

of both husband and wife that certain relatives of both should be provided for in their wills. Each of them had an interest in its performance as affecting those who were near and dear to them. The undertaking of each to perform was a sufficient consideration for the promise of the other. . . The breach of it by the one cannot but operate as a fraud upon the other. The husband continued to rely upon the contract, and at his death all of his property passed to his wife under his will. While by mutual consent the contract might have been abrogated during the lifetime of the husband, at his death it became an irrevocable obligation on the part of the wife." (Page 305)

* * * * *

"'Where an agreement is entered into by two persons, and especially by husband and wife, to make mutual and reciprocal wills disposing of their separate estates pursuant to their mutual agreement, and where mutual and reciprocal wills are made in accordance with that agreement, and where, after the death of one of the agreeing parties, the other takes under the will and accepts the benefits of said agreement, equity will enforce specific performance of said oral agreement and prevent the perpetration of fraud which would result from a breach of the agreement on the part of the one accepting the benefits thereof.'" (Page 306)

Other state courts have also applied this equity argument when imposing restrictions on a surviving spouse's power of disposition. In ***Campbell v. Dunkelberger, 172 Iowa 385, 153 NW 56 (1915)***, a widow who had executed a joint Will with her husband each receiving a life estate in the property of the other with provisions as to their remainder was restrained from deeding 120 acres to her son in violation of the joint Will. (Page 57) In so holding, the Court stated:

"Under this joint will the widow accepted the life estate in her husband's property. . . which but for the agreement she might not have acquired from her husband. Moreover, such agreement had induced him to leave the residue of his estate to his children, when but for the joining of the wife therein in the disposition of the "rest and residue of our estates" he might have made other disposition thereof. " (Page 59)

In re Estate of Buckner, 186 Kan 176, 348 P 2d 818 (1960), a husband and wife executed a joint mutual will leaving the property first to the survivor "without restrictions or limitations" and then upon the survivors' death one-half to a niece of the wife and one-half to the husband's sisters. (Page 821) Upon the wife's death, he

gifted the property to his sisters and niece. (Page 823) In stating aside these gifts, the Court stated:

> "The intent of Sarah and Edward was to give their respective relatives a definite share in their estate and after the death of Sarah with no change in the contractual will and Edward's acceptance of benefits under the contractual will, he could not defeat that intention." (Page 826)

In ***Wagner*** *v.* ***Wagner, supra*** (NY case), the Court stated:

> "Indeed, to permit the one who survives to gain the benefits of the joint will and then to flout its provisions in violation of the promise made to the other "would be a mockery of justice". The principle, supported by reason and equity, has been followed in this State as well as in other jurisdictions." (Page 643)

In Re Doerfer's Estate, 100 Colo 304, 67 P 2d 492 (1937), two bachelor brothers made mutual Wills leaving everything first to each other without restriction and then to various nieces and nephews. (Pages 492-493) After the death of one brother, the other brother became friendly with a young woman and gave a substantial portion of their joint property to her. In impressing a trust upon the property, the Court stated:

> "It is our opinion . . .that the pact between the two brothers, with reference to the disposition of their property by the survivor, the coincidental making of their mutual wills and the fact that Jacob Doerfer received and accepted the property of Joseph through his will, impressed all of the property of which Joseph died seized and possessed, with a constructive trust which then became operative by law by reason of his fraud in attempting to will to the proponent the bulk of the estate. . ." (Page 494)

> "Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of his property and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate.'" (Page 495)

In ***Brown*** *v.* ***Superior Court of Los Angeles County, supra,*** the Court stated:

"Where two parties agree to make mutual wills, each promising to dispose of his property to the other or, if the other be dead, to certain third persons, and one of the parties performs by leaving his property to the other, the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement. The contracting party who survives becomes estopped from making any other or different disposition of the property, and his obligations under the agreement become absolutely irrevocable and enforceable against him, at least where he avails himself of the provisions of decedent's will in his favor and accepts substantial benefits thereunder." (Page 881)

In ***Bower*** *v.* ***Daniels, supra***, (Missouri case) it is stated:

"After the death of the testatrix, her husband, William Daniel, accepted the provisions of the will in his favor, and under such circumstances equity will enforce the the provisions of the will against him. . ." (Page 357)

Similarly, in the case of ***In Re Estate of Chayka, supra***, (Wisconsin case), the Court stated:

"'When two persons enter into an agreement to make, and do actually make, mutual and reciprocal wills by which each bequeaths her estate to the other, if she survives, and the survivor takes under such a will and accepts the benefit of such a mutual will and accepts the benefit of such a mutual agreement, equity will take such action as may be necessary to give effect to the mutual agreement that the property of the survivor shall go to the person designated by such agreement. " (Page 565)

NATURE OF RESTRAINT

It is Appellants' position that the nature and extent of the restraint upon a surviving spouse's power of disposition is one of "good faith and fair dealing." In this case, HERBERT had the right to dispose and use the property for his support and maintenance and other reasonable use and enjoyment. This proposition is supported by case law from other jurisdictions.

In ***Ashley*** *v.* ***Volz, 218 Tenn 420; 404 SW2d 239 (1966)***, a husband and wife executed a joint Will that provided upon the death of either, all of their property would go to the survivor except for specified gifts and that upon the death of the survivor, the unexpended residue owned by the survivor would then go to their

only son, if living, and if not, to his children. (Page 240) The mother died first. The father remarried and then gave to his second wife the property that otherwise would have gone to his child or grandchildren. (Pages 240-241) The Court in imposing a constructive trust upon the property for his grandchildren after the death of his son, quoted with approval the Rhode Island case of ***Daniels v. Aharonian, 63 RI 282; 7 A2d 767 (1939)***:

> "'Moreover, if that part of the agreement which binds the surviving party contains no provision defining such party's powers over the whole property during the survivorship, but only provides that he shall by will dispose of his property at his death to certain beneficiaries a certain way, then it seems to be well settled that he holds all the property subject to a trust to carry out the agreement, but may use not only the income but reasonable portions of the principal for his support and for ordinary expenditures, and may change the form of it by reinvestment and the like, *but must not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement...*" (Pages 243-244)

In re Barnes Estate, supra (Ohio case), it is stated:

> "While they can use and enjoy the estate to its fullest extent for their support, and consume the whole of it, if necessary, they cannot go beyond what would be regarded as good faith toward the remaindermen... He therefore gave her the right to consume but not to recklessly squander or give away the estate." (Page 98)

In ***Fitch v. Oesch, supra*** (Ohio case) the Court indicated:

> "It is also the court's interpretation, and the court finds that the survivor of the two of these parties, Lela Oesch, had a perfect right to spend and use up as much or all of the property as she desired because the first provision made in the will was to leave it to the surviving spouse...
>
> ... the agreement takes priority over any other disposition made during the lifetime of Lela Oesch, of any of her property, except that used for her own purposes and living." (Pages 208-209)

In ***Price v. Aylor, 258 Ky 1, 79 SW 2d 350 (1935)***, the Court described the restrictions as follows:

> "the conclusion is inescapable that it was the intention of the testator and testatrix that the survivor should take a life estate with full and unrestricted right to its use and enjoyment and for his or her maintenance and support. Possibly, and if necessary, it might have been used for such purpose even to the extent of exhaustion ..." (Page 352)

In ***Lawrence v. Ashba, supra***, (Indiana case), the Court described the restrictions as follows:

> "it seems clear the parties intended that the survivor should have the use and benefit of the property for life, he to have the right to dispose of any or all of the corpus of the estate for his reasonable needs in the event the income should be inadequate for that purpose, but he could not dispose of it to defraud and defeat his obligation." (Pages 571-572)

In **Wagner v. Wagner, supra** (New York case), it is stated:

> "Each [testator] was at liberty during his lifetime to use his own [property] as he saw fit, short of making a different testamentary disposition or a gift to defeat the purpose of the agreement, which was that upon his death each was to leave the property of which he was then possessed in the manner agreed upon.
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> * * * * *
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> "Raymond of course, was free during his lifetime to use the property so received but he could not make a testamentary disposition contrary to the agreement or a gift, as he did here, to defeat the purpose of the agreement" (Pages 643-644)

In ***DiLorenzo v. Cianco, 49 AD 2d 756, 373 NYS 2d 167 (1975)***, where a husband and wife left their property first to the survivor and upon the survivor's death to their children, the Court described the survivor's power over the property as follows:

> "By reason of the reciprocal wills, his ownership of that property, as survivor, was impressed with a constructive trust to leave so much of that property as he would not use during the balance of his life, for his reasonably necessary maintenance, to their three children, equally." (Page 170)

In re Estate of Mulholland, 20 Cal App 3d 392, 97 Cal Rptr 617 (1971), the Court defined the surviving spouse's use of the property as follows:

> ". . . in spite of the language which seemed to give the survivor the property in fee, the proper construction of the will was that the survivor received a life estate with the right ot consume it in part or all. . . the type of life estate created by the mutual will is one which empowers the survivor to 'consume part or all of the principal' for his own use and benefit. This power is restricted to the life tenant using the estate solely for his own use." (Page 396)
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> * * * * *
>
> "What appears to be an outright bequest to one but with a provision that on that one's death the property should go to another is held to grant only a life estate with power of reasonable

consumption to the first." (Page 397)

The reasonable use and enjoyment of the property does not include the right to gift or give away the property or dispose of it in a manner which would defeat the purpose of the agreement. This proposition is supported by case law from other jurisdictions.

In ***Fitch v. Oesch, supra***, (Ohio case), the Court held the surviving spouse had the power to dispose of the property for her living purposes but then framed the issue before it as follows:

> ". . .does this carry over to her right to give it away or place it in nonprobate assets out of the reach of the will and interpretation of the agreement."
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> The Court answered, "No," stating:
>
> "An agreement of this sort is peculiarly subject to the protection of the court. One of the parties had died and therefore has no way to seek enforcement of the agreement. To say that she has a right, out of her property, in view of the agreement, to dispose of any property in any way except by the agreement, by joint and survivorship accounts or by free gift, and also in this case by codicil to her will, is to say that the agreement for all practical purposes is not to be enforced. It is a logical conclusion that anyone can for all practical purposes abrogate with impunity this agreement if they can make gifts of the property as they see fit or to place it in bonds or such so that the effect of the agreement becomes null and void. If such be the case, then these agreements are of no value and the agreement would be able to be abrogated with impunity by the survivor by use of the law on joint and survivor accounts or by gift to dispose of the property.
>
> Therefore the court rules that the agreement is binding on Lela Oesch and she could neither by the contrivance of joint and survivor accounts, or bonds or by codicil to will, dispose of her property in any other way than under the agreement of December 27, 1963 . " (Page 208)
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> * * * * *
>
> ". . .the agreement takes priority over any other disposition made during the lifetime of Lela Oesch, of any of her property, except that used for her own purposes and living. Thus the court rules that the property that she had at the date of the codicil and left to Wayne Oesch as Trustee for Lawrence Oesch, and any and all other property that she disposed of during her lifetime as gifts or through the means of joint and survivorship agreements, must be considered in full as part of the estate." (Pages 208-209)

In ***McGinn v. Gilroy, 178 Or 24, 165 P 2d 73 (1946)***, sisters executed mutual Wills leaving all of their property to the other to have and dispose for their use and benefit "absolutely" and

upon the death of one sister whatever "may remain in her possession at the time of her death" to named beneficiaries. (Page 75) In reading that Will provision in its entirety, the Court stated it did not authorize the surviving sister to give that property away prior to her death. (Page 81)

In ***Monroe v. Holleman, (Miss) 185 So 2d 443 (1966)***, a husband and wife left their property first to each other "without limitation" upon his or her use, enjoyment or disposal of the same and upon the survivor's death, one-half to each testator's family. (Page 447) Following the death of the husband, the wife used joint estate monies to set up various joint savings accounts with her brothers and sisters. (Page 444) In setting aside the joint accounts, the Court stated:

> " . . .we have reached the conclusion that the instrument here involved is more than a will, it is also a contract. We are of the opinion that Item VII of the will here in issue is intended to be a contract between the testators for the disposition of their joint estate in a mutual will.
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> * * * * *
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> "Construing the will here involved in the light of the contract which is a part of the will, we are convinced that the surviving testator could not legally give away a great part of the corpus of the estate and thereby defeat the agreement therein contained ''that whatever of the estate remains after the death of both of us shall pass to our respective families, one-half to each family. . .'
>
> . . . Maggie Lou Holleman attempted to disregard her agreement by placing a great part of the estate in joint accounts and joint bonds in an effort to transfer the residue of the estate to her own family in preference to an equal division of the residue between their ''respective families.''" (Page 448)
>
> "We hold, therefore, that Maggie Lou Holleman was estopped to repudiate the agreement contained in the will, and that she could not defeat the clear intention of the will by giving a large part of the estate to her family in preference to that of her husband's family." (Page 449)

In Re Estate of Thompkins, 195 Kan 467, 407 P 2d 545 (1965), involved a contractual Will of husband and wife which

contained the following provision:

> "'Second. All property, whether jointly or separately held and whether real or personal owned by either of us is hereby devised and bequeath to the survivor, with the right of disposal'. . .." (Page 548)

The Court in that case held that the phrase "with the right of disposal" as used in the Will did not authorize the survivor to "give" property away. (Page 550)

Similarly, in ***In Re Estate of Buckner, supra*** (Kansas case), the parties' joint will contained the following provision:

> ""After the death of either of us, the survivor shall have the right and privilege of selling, mortgaging and disposing of any property coming to him or her by the terms thereof, without restrictions of any kind, . . .' (Page 821)

The Court held that provision did not allow the survivor to make gifts and deeds without consideration. (Page 826)

In ***Klooz v. Cox, supra*** (Kansas case), the Will provided that the survivor would receive all property "to be used at their discretion." (Page 1351) The Court held such language did not authorize the survivor to make gifts of the property stating:

> "Language in a contractual will defining the powers and rights of the survivor as to property affected by the will and in his hands, must be subordinated to the basic purposes of the contract." (Page 1351)

For the above reasons, Appellants assert HERBERT VanCONETT did not have the right to convey to Defendant DURUSSEL the parties' home by Quit-Claim Deed for $1.00. Also his actions in gifting and giving away property to Defendant LEIDLEIN and placing in non-probated assets with Defendant LEIDLEIN other property of the parties violated the parties' mutual Wills agreement.

RELIEF

WHEREFORE, Plaintiffs-Appellants respectfully request this Court:

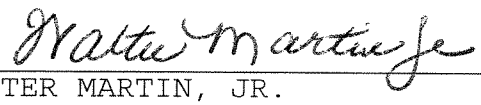
A. Set aside the Probate Court's Order, dated February 25, 2003, granting summary disposition in favor of Defendant, MARIANNE DURUSSEL, and direct entry of an Order granting Plaintiffs' Summary Disposition on their Complaint against Defendant, MARIANNE DURUSSEL.

C. Set aside the Probate Court's Order, dated March 24, 2003, granting summary disposition in favor of Defendant, ELIZABETH LEIDLEIN.

I declare that the statement above are true to the best of my information, knowledge and belief.

Dated this 8th day of March, A.D., 2006.

Respectfully Submitted,



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